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PHOTOGRAPHS AS DEMONSTRATIVE EVIDENCE IN THE COURT ROOM

INTRODUCTION

Evidence is generally considered the oral description of the facts by a witness elicited through testimony. Nevertheless, another important area of evidence is that involving demonstrative or real evidence. Demonstrative evidence has been defined as that which is addressed to the senses without the intervention of testimony¹. It should be used to clarify or support the oral testimony, not to confuse the jury or cloud the issues.² When witnesses are inarticulate as to what they have seen, demonstrative evidence can be used to portray the facts in such a way that the entire situation is unfolded before the eyes of the jury. Such facilitation aids the jury in coming to a better understanding of the facts than if the evidence were restricted to a simple oral presentation.³

In verbal testimony, a body of rigid and technical rules has emerged to govern admissibility. This is not the case with real evidence. The types of demonstrative evidence and the ways in which it can be used are so varied that any detailed rules are impractical. Whether or not demonstrative evidence offered in a trial is admitted, is determined at the discretion of the trial judge.⁴ Only a clear abuse of this discretion will be reversible error.⁵

GENERAL RULES ON ADMISSIBILITY OF PHOTOGRAPHS

The same general criteria, set out above, is applicable

1. *State v. Merritt*, 66 Nev. 380, 212 P.2d 706 (1949). *Kabase v. State*, 31 Ala. App. 77, 12 So. 2d 758 (1943).

2. *Wylde v. Patterson*, 31 N.D. 282, 153 N.W. 630 (1915).

3. *Ibid.*

4. *State v. Stansberry*, 182 Iowa 908, 166 N.W. 359 (1918). *Knox v. City of Granite Falls*, 245 Minn. 11, 72 N.W.2d 67 (1955). *Landro v. Great N. Ry. Co.*, 117 Minn. 306, 135 N.W. 991 (1912).

5. *Coonley v. Lowden*, 234 Iowa 731, 12 N.W.2d 870, 878 (1944), wherein the Iowa court states it has never reversed for error in the admission of a photograph.

when dealing with photographs—the area of real evidence under consideration in this article. In *Wylde v Patterson*⁶ the North Dakota court stated: “The admission or rejection of photographs is largely within the discretion of the trial court. Whether they are sufficiently verified and whether they may be useful to the jury are preliminary questions addressed to him.”⁷

Professor Wigmore summarizes the use of the photograph in these words:

A photograph, like a map or diagram, is merely a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question.⁸

The review courts have outlined principles to guide judges in their exercise of discretion in the admission of photographs. The standards are many, and vary according to the subject matter and type of photograph involved. There are, however, two general criteria which must be met in the admission of every photograph—relevancy and proper foundation.⁹

The Model Code of Evidence defines relevancy as “having any value in reason as tending to prove any matter provable in an action.”¹⁰ Relevancy is an important factor when considering the admissibility of photographs because of their highly influential effect on the jury; the jury has a tendency to regard them as true representations. The photograph being used must have probative value or aid the understanding of the jury in establishing a fact.¹¹ Furthermore, the probative value must be weighed against its prejudicial effect as a final determinant in admissibility. When the prejudice outweighs the evidentiary worth of the

6. 31 N.D. 282, 153 N.W. 630 (1915).

7. *Id.* at 636.

8. 3 WIGMORE, EVIDENCE § 792 (3rd ed. 1940).

9. MCCORMICK, EVIDENCE § 181 (1954) and cases cited therein. *State v. Long*, 195 Ore. 81, 244 P.2d 1033 (1952) (This latter case gives an excellent example of how the review court considered relevancy and verity sufficiently established to permit the introduction of a “gruesome” photograph.)

10. MODEL CODE OF EVIDENCE, rule 1 (12) (1942).

11. *Knox v. City of Granite Falls*, 245 Minn. 11, 72 N.W.2d 67 (1955). *Selleck v. City of Janesville*, 104 Wis. 570, 80 N.W. 944 (1899).

photograph, it should be excluded.¹² Where a part of the evidence is relevant and a part irrelevant and prejudicial, some courts have excluded the whole of it.¹³

Photographs can produce the prejudiced effect spoken of above when they tend to exaggerate the injury or the gruesome nature of the criminal act. Objection to the introduction of photographs on the basis of gruesome character has been made many times but sustained in only a few exceptions.¹⁴

"Gore" in itself is not a proper basis for exclusion.¹⁵ Color photographs add little to inflame the jury when the crime of which they are evidence is revolting.¹⁶ Where the gruesome photograph is not necessary to prove a material fact but only adds gory details, it should not be admitted because of its prejudicial effect.¹⁷

Having overcome the objections as to relevance and prejudice the next step to the introduction of the photographs is the laying of a proper foundation. The judge decides the minimal requirements.¹⁸ A witness need not be the photographer in order to authenticate the photograph.¹⁹ In order to authenticate the photograph the witness need only recite the circumstances under which the photograph was taken and that it is a true representation of the scene with which he is familiar.²⁰ When the picture was taken is of little importance unless the conditions are substantially different than those at the time in issue. Any variation can be explained to the jury.²¹ If the photographer is the

12. In *Selleck v. City of Janesville*, *supra* note 11, at 946 the court stated.

Where photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.

13. *Morris v. E. I. Dupont de Nemours & Co.*, 346 Mo. 126, 139 S.W.2d 984 (1940). *But see*, *State v. Myer*, 37 Wash. 2d 759, 226 P.2d 204 (1951).

14. See generally Annot., 53 A.L.R.2d 1102 (1957).

15. *State v. Huff*, 14 N.J. 240, 102 A.2d 8 (1954).

16. *Commonwealth v. Makarewicz*, 333 Mass. 575, 132 N.E.2d 294 (1956).

17. *Selleck v. City of Janesville*, 104 Wis. 570, 80 N.W. 944 (1899).

18. *Long v. General Elec. Co.*, 213 Ga. 809, 102 S.E.2d 9 (1958). *McGoorty v. Benhart*, 305 Ill. 458, 27 N.E.2d 289 (1940). *Higgs v. Minneapolis, St. P. & S.S. Ry. Co.*, 16 N.D. 446, 114 N.W. 722 (1908).

19. *Kort v. Guardian Life Ins. Co.*, 144 F.2d 676 (10th Cir. 1944), *Adamczuk v. Halloway*, 338 Pa. 263, 13 A.2d 2 (1940).

20. See generally McCormick, EVIDENCE § 181 (1954).

21. *Sherlock v. Minneapolis, St. P. & S.S. Ry. Co.*, 24 N.D. 40, 138 N.W. 976 (1912). *Higgs v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 16 N.D. 446, 114 N.W. 722 (1908). *Contra* *Wylde v. Patterson*, 31 N.D. 282, 153 N.W. 630 (1915).

witness, he may be examined closely as to his qualifications, skill, experience and ability. The methods used in developing the film and the type of equipment and its perfection and capabilities may also be questioned by the attorneys for either party.²²

Pictures used to show distances are generally considered misleading; photographs which are misleading in what they represent have no probative value and consequently should be excluded.²³ A partial scene depicted in a photograph can be rejected where the total view is needed and conditions important to understanding the scene are omitted.²⁴ In *Stone v. Northern Pac. Ry. Co.*,²⁵ the court thought that such a photograph tended to slant the evidence in favor of the party offering it. Further, the court stated that when a photograph is introduced in order to show what was seen from a particular vantage point, it must be taken from that position. Otherwise, the judge may feel that the jury will be misled and exclude it.

Wigmore has taken the position that misleading photographs should not be excluded.²⁶ If they are proper and accredited, they should be admitted. To permit the judge to reject on the basis of it being misleading is the same as permitting certain testimony to be struck because the judge believed the witness was lying or at least slanting the truth.²⁷ There are those courts which by their decisions seem to agree with Wigmore in substance, but as to whether they would go as far is another question.²⁸

In *Higgs v. Minneapolis, St. P. & S.S. Ry. Co.*,²⁹ the court disapproved the contention that photographs be considered conclusive evidence. Although photographs can be more accurate than verbal descriptions, the conclusiveness of it is to be decided by the jury and not the judge. Most

22. *Higgs v. Minneapolis, St. P. & S.S.M. Ry. Co.*, *supra* note 21. See also, *Green v. City and County of Denver*, 111 Colo. 390, 142 P.2d 277 (1943).

23. *Hadrian v. Milwaukee E.R. & T. Co.*, 241 Wis. 122, 1 N.W.2d 755 (1942).
Ligon v. Allen, 157 Ky. 101, 162 S.W. 536, 538 (1914) (Dicta. the proof to establish authenticity is much more stringent.)

24. *Stone v. Northern Pac. Ry. Co.*, 29 N.D. 480, 151 N.W. 36 (1915).

25. *Ibid.*

26. 3 WIGMORE, EVIDENCE § 792 (3rd ed. 1940).

27. *Ibid.*

28. *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471, *aff'd* 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1955), See *Haven v. Snyder*, 93 Ind. App. 54, 176 N.E. 149 (1931).

29. 16 N.D. 446, 114 N.W. 722 (1908).

judges have admitted photos on the same basis as maps, charts and diagrams; they are not irrefutable but should be considered with the other evidence received.

The judge decides whether a photograph is admissible, and the jury passes on its credibility and the weight to be given to it. A photograph's credibility should be determined by the manner and circumstances under which it was taken, the photographer and his skill, and the perfection of the equipment used.³⁰ These same standards could be employed in regard to its admissibility.³¹

Photographs are considered secondary evidence.³² The object or view that the photograph is to represent must be admissible. If the subject of the photograph could not be introduced, the picture of it must be excluded. If the scene portrayed might easily be visited by the jury, the photograph should not be used in place of an actual inspection.³³

If the photograph is merely cumulative evidence, it may be rejected since it adds nothing and may overemphasize certain aspects.³⁴ However, decisions allowing the photographs in court even though there was a showing that they were merely cumulative, are not a rarity.³⁵

COLORED PHOTOGRAPHS

Colored photographs have no separate rules governing their admissibility.³⁶ Even where the colored picture has been tinted or touched up, it has been admitted into evidence if the purpose was valid and full explanation has been given to the jury.³⁷ Added gruesomeness brought into the case

30. *Ibid.*

31. See note 22, *supra*, and the accompanying text.

32. *Wylde v. Patterson*, 31 N.D. 282, 153 N.W. 630 (1915). *Contra*. *Higgs v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 16 N.D. 446, 114 N.W. 722 (1908). *Van Houten v. Morse*, 162 Mass. 414, 38 N.E. 705 (1894). *Alberti v. New York L.E. & W.R. Co.*, 118 N.Y. 77, 23 N.E. 35 (1899).

33. *Wylde v. Patterson*, *supra* note 32.

34. *Ibid.*

35. *State v. Huff*, 14 N.J. 240, 102 A.2d 8 (1954). *State v. McMullan*, 223 La. 629, 66 So. 2d 574 (1953).

36. *Commonwealth v. Makarewicz*, 333 Mass. 575, 132 N.E.2d 294 (1956). *State v. Huff*, *supra* note 35, at 13. See also, *Farrell v. Weitz*, 160 Mass. 288, 35 N.E. 783 (1894), wherein the court seemed to lament the fact that a black and white photograph was being used which tended to have less evidentiary value in showing the likeness of a deceased putative father—color of eyes, hair and complexion.

37. *Green v. City and County of Denver*, 111 Colo. 390, 142 P.2d 277 (1943). *Harris v. Snider*, 233 Ala. 94, 134 So. 807 (1931). See also, *People v. Madison*, 3 Cal. 2d 668, 46 P.2d 159 (1935).

by color is not a basis for disqualification.³⁸ In *Knox v City of Granite Falls*,³⁹ the Minnesota court placed a limitation upon the introduction of colored photographs. By way of dicta the court said:

However, it should be noted that caution must be exercised in admitting colored photographs which may tend to exaggerate the seriousness and extent of wounds or burns. Where such photographs give false impressions of disability or of pain and suffering endured, the prejudicial effect might well outweigh their probative value.⁴⁰

There have been no reported cases which have stated approval of this distinction and employed it in making a decision.

INDECENT PHOTOGRAPHS

The courts of the various states divide on the admissibility of indecent photographs. Courts in Wisconsin, on the basis of public policy, do not permit such pictures for any reason.⁴¹ The rationale is that it brings justice into disgrace, ridicule and contempt, and is a defilement of the proceedings. In reversing the receipt of a photograph showing the back of a girl nude from below the shoulders to mid-thigh the Wisconsin court said:

No such indecency is ever necessary, or should be tolerated, in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it.⁴²

The judge went on to say that if the photograph had been displayed in the court room by one of the parties they

38. *State v. Huff*, *supra* note 35. Compare, this decision which is very liberal in the admissibility of demonstrative evidence (photos) with another from the same jurisdiction, *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958), wherein the court takes the conservative minority position that demonstrative evidence (charts) should not be admitted for purposes of figuring pain and suffering.

39. 245 Minn. 11, 72 N.W.2d 67 (1955).

40. *Id.* at 73.

41. *Guhl v. Whitcomb*, 109 Wis. 69, 85 N.W. 142 (1901) *Selleck v. City of Janesville*, 104 Wis. 570, 80 N.W. 944 (1899).

42. *Guhl v. Whitcomb*, *supra* note 41, at 145.

could have been held in contempt. As it was, the lower court was censured for the flagrant error in admission.⁴³

Being more liberal in this respect, Missouri courts have permitted the introduction of a photograph of a nude girl. The court stated that this was within the sound discretion of the trial court.⁴⁴

North Dakota has not had occasion to rule on a case involving an indecent picture. However, in *Sullivan v Soo Line*⁴⁵ they permitted the person injured to exhibit private parts of his body. They stated:

However much of indecency may be involved in the exhibition in the instant case, we are not prepared to say that it went beyond the legitimate bounds for placing before the jury the actual facts in the case.⁴⁶

If the court has allowed the exhibition of a person's private parts, it seems only a logical step to permit a photograph of the same things; it would certainly be much more impersonal.

ENLARGED PHOTOGRAPHS

If there is a smaller picture in evidence, the enlarged one is not admissible unless it has particular probative value of its own.⁴⁷ The means of enlargement, whether by blowing up the picture or enlarging by a projector, has no effect on admissibility.⁴⁸ Distortion and inaccuracy are the two main grounds of contesting admissibility.⁴⁹ The standard objection is that the enlargement has distorted the object and does not truly represent it.⁵⁰

MOTION PICTURES

The same principles of admissibility, used for still photo-

43. *Ibid.*

44. *Petty v. Kansas City Public Service Co.*, 354 Mo. 823, 191 S.W.2d 653, 658 (1945).

45. 55 N.D. 358, 213 N.W. 841 (1927).

46. *Id.* at 846.

47. *Oviatt v. Wojcicki*, 95 Conn. 562, 111 Atl. 837 (1920).

48. *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471, *aff'd* 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956).

49. See generally *Wesley v. State*, 32 Ala. App. 383, 26 So. 2d 413 (1946), *State v. Hause*, 83 N.H. 133, 130 Atl. 743 (1925) *State v. Sheppard*, *supra* note 46.

50. *Urban v. United States*, 237 F.2d 379 (9th Cir. 1956).

graphs, apply to motion pictures.⁵¹ However, the courts are cautious in the use of motion pictures and tend to set a higher standard of admissibility because of their susceptibility to fabrication.⁵² Juries have a tendency to relate motion pictures to reality and accept them as true and accurate, thereby giving them greater weight than they are entitled to have.⁵³ If the motion picture is verified as a documentation and not an artificial reconstruction, it should be admitted.⁵⁴

CONCLUSION

In the past attorneys have relied heavily on verbal testimony to establish their cases. With the improvement of cameras and development of new techniques of photography, the attorney can substitute photographs for verbal testimony or use them in support of verbal testimony. The jury is thereby exposed to facts that may not have been clear in a simple verbal description.

Appellate courts have laid down only broad rules for the admission of pictures. The obstacle in each determination is how the trial judge exercises his discretion. In conservative jurisdictions like North Dakota the disparity of opinion among the various trial judges becomes a special problem.

One writer suggests "going into chambers" as a procedural device to be employed when an attorney wants to introduce demonstrative evidence of a novel type in a conservative court.⁵⁵ This would apply to photographs in most instances. The chances of the photographs being accepted by the court is increased by such a maneuver because it tends to remove distrust engendered by the element of surprise.

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51. *Commonwealth v. Roller*, 100 Pa. Super. 125, 83 A.L.R. 1315 (1930). *Pandolfo v. United States*, 286 F. 8 (7th Cir. 1922), *cert. denied*, 261 U.S. 621 (1923).

52. *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158, 161 (1937).

53. *Commonwealth v. Roller*, *supra* note 51. *Motion Pictures in Evidence*, 8 Brooklyn L. Rev. 290, 291 (1939).

54. *McGoorty v. Benhart*, 305 Ill. App. 458, 27 N.E.2d 289 (1940). *Denison v. Omaha & C.E. St. Ry.*, 135 Neb. 307, 280 N.W. 905 (1938), 3 WIGMORE, EVIDENCE § 798a (3rd ed. 1940).

55. BELL, TRIAL AND TORT TRENDS, 296 (1958).